

***United States Court of Appeals  
for the Second Circuit***



**BRIEF FOR  
APPELLEE**



*Original with Affidavit  
of Mailing*

**76-1103**

To be argued by  
GAVIN W. SCOTT

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PFS*

**United States Court of Appeals  
FOR THE SECOND CIRCUIT**

**Docket No. 76-1103**

UNITED STATES OF AMERICA,

*Appellee,*

*—against—*

MICHAEL CHARLES VESCERA, JR., and  
ANTHONY FERRANTE,

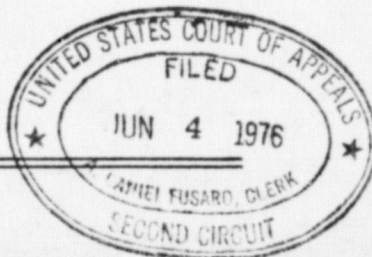
*Appellants.*

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF NEW YORK

**BRIEF FOR THE APPELLEE**

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—against—

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ANTHONY FERRANTE,

*Appellants.*

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**BRIEF FOR THE APPELLEE**

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**Preliminary Statement**

Michael Charles Vescera, Jr. and Anthony Ferrante appeal from judgments of conviction on a three count indictment charging each with possession of property stolen from foreign and interstate commerce (Count One—18 U.S.C. §§ 659 and 2), possession of property unlawfully removed from a bonded warehouse (Count Two—18 U.S.C. §§ 549 and 2), and conspiracy (Count Three—18 U.S.C. § 371), which were entered in the United States District Court for the Eastern District of New York after a jury trial before the Honorable Henry Bramwell, United States District Judge.<sup>1</sup> Both appel-

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<sup>1</sup> Prior to trial, but after a suppression hearing, co-defendants Steven Murgatroyd, Otto John Heidel and Anthony Lanza were severed from the case by the trial judge. Subsequent to the trial of Vescera and Ferrante, Murgatroyd pled guilty to Count One and was sentenced to seven years imprisonment. Heidel and Lanza pled guilty to Count Three and were sentenced to three and two years respectively.

lants were sentenced to terms of imprisonment of seven, two and five years respectively on the three counts, the sentences on Counts Two and Three to run concurrent with that imposed on Count One. Vescera and Ferrante are currently on bail pending appeal.

On appeal appellants initially seek a remand for a new suppression hearing and the production of the informant or a reversal of the trial judge's denial of their motions to suppress. Ultimately appellants request a reversal of their convictions claiming the evidence was insufficient to support the jury's verdict and alleging four instances in which they were deprived of a fair trial.

### **Statement of Facts**

During the early morning hours of November 12, 1972, a United States Customs bonded facility known as the Air Freight Warehouse, 130-10 180th Street, Queens, New York, was burglarized. The alarm system was neutralized and approximately \$187,000 worth of assorted merchandise was stolen (T 44-54, 86).<sup>2</sup> Two and a half days later, the bulk of this stolen property was found in a building at 1956 Flushing Avenue, Queens, New York in the possession of appellants Vescera and Ferrante and co-defendants Murgatroyd, Heidel and Lanza.

Agents of the Federal Bureau of Investigation had arrived at the vicinity of 1956 Flushing Avenue at about

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<sup>2</sup> Numbers in parenthesis preceded by an "S" refer to pages of the suppression hearing transcript. Numbers preceded by a "T" refer to the trial transcript.

9:00 o'clock in the morning on November 15th and observed the defendants' activities at the premises. The agents' presence at the scene was occasioned by information supplied by an informant earlier that morning. This same informant had first supplied information to the Bureau in late October, 1972. At that time he told Agent Nadler of the F.B.I. that the appellant Ferrante was operating a "drop" in the vicinity of Flushing and Metropolitan Avenues (S 20-21, 27-28).

Although the informant did not give the street address of the "drop", he did describe the outside appearance of the front and rear of the premises. Agents went to the area and determined that the location described by the informant was 1956 Flushing Avenue. Agents then proceeded to spotcheck this location for activity (S 28, 76-77, 49-50). On October 26, 1972, Agent Nadler observed the appellant, Anthony Ferrante leave the Elk's Bar on Flushing Avenue, Brooklyn, which he owned and operated, and drive a car to the rear of 1956 Flushing Avenue. Ferrante was observed entering the rear door of the building and departing about fifteen minutes later carrying a carton which he placed in the trunk of his car which he drove back to the Elk's Bar (S 28-33).

On November 8, 1972, this informant gave Agent Nadler information concerning one of the other defendants in the case (S 186). Two days later, November 10, 1972, during a spotcheck of this premises, Agent Nadler and Agent Collins observed a green step van being driven from 1956 Flushing Avenue to a garbage dumpster located several blocks away where two unidentified white males unloaded cartons from the step van and placed them in the dumpster. The green step van was then surveilled back to 1956 Flushing Avenue where it was driven inside the building. The agents then returned to the scene of the dumpster and ascertained that

various labels marked Tioga Industries were contained with cartons similar to those which had been observed to be placed into the dumpster by the above-mentioned unidentified, white males. It was further determined that these labels had come from cartons which had been previously stolen while in interstate commerce (S 33-37).

On November 15, 1972, at approximately 8:00 A.M., the same informant called Agent Nadler and advised that there had been a burglary at the Air Freight Warehouse in Queens on the 11th or 12th of November and that "a large amount of merchandise, including whiskey, volatile chemicals, guns, paintings, and cigarettes had been stolen" (S 38). The informant further stated that the stolen goods were at 1956 Flushing Avenue and that they were going to be moved out that morning in two rented trucks (S 38-39). Prior to receiving this information the agents knew of the burglary and the nature of the various items stolen and that numerous cases of stolen liquor were marked Fenton Hill American Limited (S 39, 354-55).

Upon receipt of this informant information a surveillance of 1956 Flushing Avenue was initiated by the F.B.I. at approximately 9:00 A.M. At about 11:00 A.M. Steven Murgatroyd and Otto Heidel arrived at 1956 Flushing Avenue in a black Ford and entered said premises through the rear door located on Troutman Street. This same black Ford had been observed at the intersection of Flushing and Metropolitan Avenues on November 10, 1972 (S 39-41, 46). Five minutes later Murgatroyd exited the rear door, proceeded to a 4G's rental truck parked on Troutman Street, drove it around the block and backed it into 1956 Flushing Avenue through the front garage door (S 47).

At about 11:30 A.M., the appellant Ferrante walked up to 1956 Flushing Avenue and entered through the

pedestrian door which was adjacent to the above noted roll up garage door. Forty-five minutes after Ferrante's arrival, Murgatroyd exited the front pedestrian door of the premises, walked across the street to a Sunoco gas station and returned with an air compressor. Shortly thereafter, Heidel drove the black Ford from the back of the premises around the block into the same Sunoco station and obtained gas. At this time, approximately 12:30 P.M., the roll up door to 1956 Flushing Avenue opened and Murgatroyd drove the 4G's truck across Flushing Avenue and into the Sunoco station. He returned the air compressor and had a brief conversation with Heidel (S 48-55, 300).

Murgatroyd and Heidel concluded their conversation and returned to their respective vehicles. At this point, Ferrante and Anthony Lanza exited the pedestrian door of 1956 Flushing Avenue and Ferrante made hand signals to the driver of a Hertz truck which was parked on Flusing Avenue. The Hertz truck was then driven directly into premises and the garage door was closed behind it (S 55-58). Simultaneous with the entry of the Hertz truck into 1956 Flusing Avenue, the 4G's truck and black Ford departed from the Sunoco station and proceeded to Flushing Avenue (S 58).

The aforesaid observations of activities were related to all agents engaged in the surveillance via two way radio (S 50-52, 58, 301, 343, 393). Of course, the agents also knew the details of the burglary, were aware of the informant information and knew that "there were several individuals known to our office involved" (S 343-44).

Agents Good and McGoey, in an unmarked F.B.I. car, observed the 4G's truck followed by the black Ford proceeding down Flushing Avenue for a short time and

pulled along side with their red light flashing. At this point Agent Good saw both Heidel and Murgatroyd talking into portable or mobile radio devices. The agents stopped the 4G's truck and black Ford and removed the drivers. Agent McGoey then opened the back door of the 4G's truck and the agents observed that the truck was packed with cases of liquor a number of which contained Fenton-Hill markings and other markings indicating that the bottles contained a quart and a fifth. Murgatroyd and Heidel were then placed under arrest and Agent Good notified the other agents over the radio that the truck had been stopped and that it contained "merchandise identifiable with the burglary". The defendants and their vehicles were then taken back to 1956 Flushing Avenue (S 344-362).

As soon as Agent Good radioed that the 4G's truck contained merchandise taken in the Air Freight Warehouse burglary Agent Nadler gave instructions to agents to go to the back door of the "drop" and advised that he was going to the front door (S 62, 441). Agent Nadler and other agents arrived at the front of the premises and knocked on the roll up garage door. A voice from within asked, "who is it", and the agents responded "F.B.I.". The agents then heard footsteps running away from the door (S 59-61).

In the meanwhile, Agents Armstrong, Strand and Sandidge had positioned themselves at the Troutman Street door or rear door to 1956 Flushing Avenue in response to Agent Nadler's directions. They then observed the rear door open and appellants Vescera and Ferrante and Anthony Lanza run out. They were stopped and immediately placed under arrest (S 442-43, 546-550, 584-85). After the arrests Agent Armstrong looked through the rear door of 1956 Flushing Avenue which had been left open and viewed numerous cases of liquor

and cases of cigarettes, as well as a yellow Hertz truck and a portion of a green step van (S 444-450). He entered the premises to determine if anyone else remained inside. During his inspection of the premises for this purpose, he observed lying in plain view, numerous items which were later seized.

After Armstrong determined that no other individuals were inside, the defendants were brought into the premises and items that were observed lying about were seized. The items included 591 cases of assorted liquor (Exhibits 11 and 13); 214 cases of domestic cigarettes (Exhibits 11 and 13); a shot gun (Exhibit 8); a rifle (Exhibit 7); a pistol (Exhibit 27); ten cases of essential oils (Exhibit 3); four cases of chemicals (T 53); four paintings (T 53); a crate of graphics (Exhibit 5); various airway bills and shipping documents (Exhibits 31, 32, 33, 34 and 35); various crate tops and boxes (Exhibits 8a, 9 and 10); a United States Customs lock (Exhibits 26 and 40) found in the green step van and a green hand truck (Exhibit 28) which were later identified as coming from the burglarized warehouse; a baptismal certificate, and social security card, all in the name of George Harris (Exhibits 38 and 39); three Motorola walkie talkies (S 592); various tools such as bolt cutters, wire cutters and crowbars (S 592); and a Hertz rental agreement in the name of Joe Gantz for the Hertz truck (Exhibit 29). All of these items with the exception of the tools, George Harris documents, walkie talkies and the Joe Gantz rental agreement constituted merchandise which had been stolen from the Air Freight Warehouse just two and a half days before (S 589-592, 599; T 55-76, 84-102, 376-385).

Also seized from the person of appellant Vescera was an unstamped, unsigned New York State chauffeur's license in the name of Joe Gantz (Exhibit 30). The identification numbers in this license matched the num-

bers in the Hertz rental agreement in the name of Joe Gantz (T. 285-89, 369, 464-65, Exhibit 29 and 30).

Upon the arrest of Steven Murgatroyd he was found to have on his person various pieces of paper with writing indicating various amounts of Johnny Walker Red Label and Black Label Scotch with the notation "1 1/5 Qts.", the names of some chemicals, figures indicating 212 watches, 197 rings and various columns of figures indicating amount of gold in carets (Exhibits 41, 42 and 43).

Subsequent investigation revealed that Otto Heidel and the appellant, Michael Vescera rented the two trucks involved on the morning of November 15, 1972. Heidel and Vescera went to the 4G's Truck Renting Company at 395 Kent Avenue, Brooklyn, New York and asked to rent two trucks. The proprietor, Allen Silverman told them he could only rent them one truck but that he would make arrangements for them to rent a Hertz truck. Heidel, using the name Angelo D'Aprile, rented the 4G's truck and Vescera using the name Joe Gantz rented the Hertz truck (T. 648-75).

At the trial, the appellant, Michael Vescera testified that he and Ferrante went to 1956 Flushing Avenue on the morning of November 15, 1972, for the purpose of purchasing burglar alarm systems for their homes. Vescera testified that when he arrived at the premises Ferrante told him that he had just missed Murgatroyd and that while he and Ferrante were waiting for Murgatroyd to return two unidentified males were loading a yellow truck (T. 441-48, 462, 472).

Vescera stated that while walking around inside the premises he saw a license on the floor, picked it up, determined that it did not belong to anyone on the premises and at the suggestion of Ferrante was holding it to give to Murgatroyd (T 448-49). This license, of

course, was in the name of Joe Gantz and was taken from Mr. Vescera upon his arrest. Vescera went on to justify his running out the back door by testifying that the two unidentified males on the premises suddenly said "We better get out of here" and ran out the back door. Vescera stated he ran after them thinking that they may have stolen something which belonged to Murgatroyd (T 453-54). Vescera denied renting the Hertz truck in the name of Joe Gantz stating that he was home that morning until 11:00 A.M. and went directly from home to 1956 Flushing Avenue (T 441, 457, 465).

Agent Armstrong was called in rebuttal and testified that no one was observed running from the back door of the premises immediately prior to Vescera, Lanza and Ferrante exiting the back door (T 707-08).

In surrebuttal Mrs. Vescera, appellant's wife, testified as did a long time friend of the family. However, the friend's testimony differed from Mrs. Vescera's in that he testified that appellant left the house approximately one hour before Mrs. Vescera testified that he left the house (T 774, 777, 782, 786).

## ARGUMENT

### POINT I

**The existence of the informant was established and the trial court did not foreclose appropriate inquiry as to his existence.**

Appellants initially seek a remand for a new suppression hearing at which the informant must be produced or indictment against them dismissed.<sup>3</sup> This relief is

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<sup>3</sup> The discussion here in Point I, and the discussion in Point II, *infra* is based on the assumption that the appellants have standing to challenge either search of the truck or the warehouse. Since the appellants were not on the truck, and had abandoned

[Footnote continued on following page]

the warehouse prior to the search of it, and since they had no proprietary interest in the truck or the warehouse, their standing to object to the validity of the search of the truck and the warehouse is necessarily based on the automatic standing rule, which was enunciated in *Jones v. United States*, 362 U.S. 257 (1960), and which affords automatic standing where the defendant is charged with a possessory offense and the possession alleged in the indictment occurred at the same time as the search. See *United States v. Tortorello*, — F.2d —, (2d Cir. Slip op. 2881-87; April 2, 1976). But, as Judge Oakes observed in *United States v. Pui Kan Lam*, 483 F.2d 1202, 1205, n.4 [C.A. 2 (1973)], that doctrine "has been questioned" in *Brown v. United States*, 411 U.S. 223 (1973) and is of "dubious validity." What remains of the rationale of *Jones*, after *Simmons v. United States*, 390 U.S. 377, 390 (1968), is summarized in the following excerpt from the opinion in *Jones* (362 U.S. at pp. 263-64):

"Petitioner's conviction flows from his possession of the narcotics at the time of the search. Yet the fruits of that search, upon which the conviction depends, were admitted into evidence on the ground that petitioner did not have possession of the narcotics at that time. The prosecution here thus subjected the defendant to the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation. It is not consonant with the amenities, to put it mildly, of the administration of criminal justice to sanction such squarely contradictory assertions of power by the Government."

We submit that this reasoning is plainly erroneous and should no longer be followed. The prosecution here is not subjecting the defendant to "the penalties meted out to one in lawless possession while refusing him the remedies designed for one in that situation." The Fourth Amendment, as far as we know, does not confer any "remedies" on one who is in the "situation" of being a lawless possessor of property. What the prosecution is saying is that the defendants are lawless possessors that as such they lack standing to complain about a seizure of property which did not otherwise invade their privacy, and that they should be punished because of their lawless possession. The position of the United States is perfectly consistent. See, generally, Trager, *The Law of Standing Under the Fourth Amendment*, 40 Brooklyn Law Rev. 421 (1975).

Although we challenged the standing of the appellants below (S. 727-728), we have relegated the argument to a footnote here only because we believe that the merits of the defendants' claims are so frivolous that the important issue regarding the continued validity of the automatic standing rule need not be reached. See *United States v. Tortorello*, *supra*, Slip op. 2887, n.4.

predicated upon the claim that the government failed to prove the existence of the informant during the suppression hearing. This claim is without substance and was not properly raised below. Aside from some very brief and idle speculation, the existence of the informant was never ever raised below, and, any question about the existence of the informant was laid to rest when Judge Bramwell announced that he had examined the "reports containing the contacts between the agent, Agent Nadler, and the informant in this case" (S 139). Nevertheless, unlike trial counsel, appellate counsel now claim that the testimony of Agent Nadler regarding the informant was fabricated and that defense inquiry, presumably designed to unmask this fabrication, was erroneously foreclosed by the trial judge. This argument should be rejected.

First, since the issue was not raised below, it is respectfully submitted that it may not be considered an appeal. *United States v. Schwartz*, — F.2d — (2d Cir. Slip Op. 3277, 3280-81, April 20, 1976. Neither Mr. Cohen nor Mr. Weisswasser (trial counsels for Vescera and Ferrante respectively) argued that the informants existence was a fabrication. It is true that Mr. Cohen did speculate during the suppression hearing, "it is not beyond the realm of possibility that perhaps no informant existed." He later noted that some judges require the name of the informant *in camera* (S 99, 134). However, this hypothetical speculation was not renewed or incorporated in his final argument on the suppression hearing (S 668-72). Likewise, Mr. Weisswasser was silent on this score in his concluding remarks (S 696-711).

Indeed, the only defense attorney who offered any argument in this regard, Mr. Preminger, did not challenge the existence of the informant. He merely inquired as to the safeguards against an agent bolstering the information supplied by an informant (687-88). Of course, Mr. Preminger ignored the fact that agent Nadler pro-

duced his reports of contact with the informant for Judge Bramwell thus providing adequate safeguards. In any event, a fair reading of the suppression record shows that the facts as given by the agents were not in issue. This was made plain by Mr. Evseroff, counsel for Heidei, "I don't think credibility of the agents was an issue at all in this hearing" (S 674).

Aside from the fact that no request was made for the production of the informant, the factual support for the claim that there was no informant rests solely on the unfounded conclusion that agent Nadler's testimony contained indicia of fabrication (Appellants' Brief pp. 29-32). A review of the record reveals that this point is specious:

When cross-examined on the specific dates of contact with the informant agent Nadler gave the dates (S 145-46, 169). Nadler first approximated that he had personally met the informant two or three times (S 69). After reviewing his reports he testified candidly that he had been in error and that he personally met the informant once and then spoke to him on the phone twice (S 144-49). To characterize this testimony as "drastically revised" and label it as an indicia of fabrication grossly exaggerates its significance. Appellants' further complaint that Nadler's testimony lacked detail sufficient to engender credibility was, in essence, passed on by the trial court, when in response to a defense claim that Nadler was being evasive, Judge Bramwell stated,

And I don't agree with you that this witness is being evasive. I think he has answered and he has answered to the best of his ability. There is nothing that I have seen from this witness which in any way makes me feel that he is being evasive (S 113).

Indeed the record amply demonstrates that Agent Nadler testified only to that which actually happened. It is ironic that appellants seek to bolster their claim that he fabricated his testimony by stating that his testimony was devoid of details.

Appellants then engage in misstatement. Agent Nadler testified on direct examination that some of the cartons thrown into the dumpster on November 10, 1972, remained on top of the other garbage and were in that position when he returned. Appellants contend that on cross-examination Nadler conceded that the cartons disappeared into the dumpster and cite pages 192-195 and 336 of the suppression record as authority. Suffice it to say these pages reflect that according to Nadler, some of the cartons remained on top as he had said.

The final deficiency in this argument is found in appellants' acknowledgment that Ferrante was of interest to agent Nadler for a reason unrelated to the information supplied by the informant. Without any suggestion of support in the record and despite the devastating concession that Nadler's testimony was neither "inherently incredible" and did not fail "to ring true" (Appellants' Brief p. 32), appellants' assert that Nadler's knowledge of Ferrante supplied a motive for fabrication. The frivolousness of this contention is self evident.

Appellants' companion argument, that the trial judge erroneously precluded inquiry into the alleged fabrication of agent Nadler, is also pregnant with a total disregard for the record and irrelevancies. Taking the purported areas of foreclosure in the order in which they appear in Appellants' Brief at page 33:

1. The trial court's decision not to require the government to file an affidavit stating how the informant's

life would be jeopardized if the dates of his contacts with agent Nadler were revealed became moot when agent Nadler testified to those very dates on cross-examination (S 186).

2. The trial court did accede to defense requests for the production of the agents reports of contact with the informant (S 128, 130, 134). These reports clearly demonstrated the existence of the informant as did the agents' testimony.

3. The court's sustaining of the government's objection to inquiry into possible monetary compensation for the informant was perfectly proper as this line of inquiry was totally irrelevant to the suppression hearing.

4. In announcing that cross-examination could not include the exact times of day of contact between agent Nadler and the informant, the trial judge was merely restating what counsel for Ferrante had previously stated was "all right" (S 91).

5. The trial court did not indicate that it was not interested in agent Nadler's credibility. Judge Bramwell merely stated he would not take the agents "conclusion as to what the legal issues are in this case" (S 242).

6. The trial court's denial of defendants motion to strike the testimony about the cartons and labels in no way foreclosed any inquiry by defense counsel.

7. The trial court properly declined to make findings of fact in view of the clear testimony of the agents during the suppression hearing. However, Judge Bramwell invited counsel to submit such findings which they failed to do except to the extent that counsel for Lanza submitted a memorandum of law containing a statement of facts.

In any event, declining to make findings can hardly be equated with foreclosing defense inquiry.

8. The trial court's decision made no mention of the so called "informant issue" because there was none (S 645).

The numerous cases cited by appellants are either irrelevant to their position or, in fact, support the actions of the agents in this case as will be discussed below in Point II. Suffice it to say that appellants' reliance on *Alderman v. United States*, 394 U.S. 165 (1968), to support the proposition that the informants identity in this case must be disclosed, is misplaced. In footnote 14 at pages 182-83, the Supreme Court distinguished electronic surveillance cases such as *Alderman* from other types of cases such as the instant case where *in camera* procedures are generally acceptable. Moreover, the facts of this case establish that the privilege of nondisclosure of the informant's identity was properly interposed. *United States v. Carneglia*, 468 F.2d 1084, 1089 (2d Cir. 1972); *United States v. Comissiong*, 429 F.2d 834, 839 (2d Cir. 1970).

Therefore, appellants claim of fabrication and request for a new suppression hearing should be rejected. Judge Bramwell observed Agent Nadler testify for two and one-half days of which two days was spent on cross-examination. A battery of five experienced and skilled defense counsel exhausted all avenues of inquiry. A fair reading of Nadler's testimony demonstrates that he remained consistent and truthful and that Judge Bramwell detected no hint of fabrication.

## POINT II

**The searches and seizures were reasonable and based on probable cause.**

Appellants next urge that the agents lacked probable cause for the searches and seizures in this case.<sup>4</sup> The basis of this argument rests upon the assumption that the only legal standard applicable is that announced in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) and that failing such test, probable cause was lacking.

It is well settled that the *Aguilar-Spinelli* test is not the only means of validating searches which partially involve informant hearsay information. Nor is it a ritual which, as appellants infer, must be invariably observed in every case. *United States v. Rollins*, 522 F.2d 160, 165 (2d Cir. 1975), *cert. denied*, 96 S. Ct 1122. Additionally, the *Aguilar-Spinelli* rule deals with hearsay affidavits used to obtain search warrants which reflect that probable cause rests or falls on informant information. *United States v. Canieso*, 470 F.2d 1224 (2d Cir. 1972). The case now on appeal is not of this variety. Rather, the instant case involves an untested informant, independent knowledge of certain suspects by agents, and independent observations by agents on the scene, the combination of which were more than sufficient to give a reasonably prudent agent probable cause. These factors are also coupled with the fact that moving vehicles created exigent circumstances necessitating action on that probable cause without delay for a search warrant.

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<sup>4</sup> Here again, we observe, that our argument is based on the assumption — which we dispute (see, *supra*, n.3) that the defendants have standing to raise the issue.

While the informant in this case had not previously supplied information leading to arrests, seizures or convictions and he apparently had not stated the source of his information to Agent Nadler, the initial information he provided in late October of 1972 was verified. The description of the front and rear of the "drop" and its location were sufficient for agents to ascertain the exact premises. Shortly after being told by the informant that Appellant Ferrante was operating this "drop", Agent Nadler surveilled Ferrante from Ferrante's bar to the "drop" where Ferrante remained for fifteen minutes and exited with a carton which he took with him. At this point in October, Nadler knew at least that the informants' information was correct in two respects—the location of the premises and Ferrante's association with it.

On November 8, 1972, the informant provided information to Nadler concerning an individual who was subsequently observed on November 15 and arrested. Independent verification of the informant's original information continued on November 10, 1972, with the dumpster incident. Despite appellants' protestations to the contrary, the observations made on that date provided Agent Nadler with at least reasonable cause to believe that his informant was supplying accurate information. The cartons and labels that were discarded on November 10 were not placed outside 1956 Flushing Avenue for presumably normal trash collection. These cartons were transported in a van from the premises to a location blocks away and deposited in an industrial garbage dumpster. When the agents retrieved the cartons and labels it was determined that they had been part of a stolen shipment of freight. Of course, on November 10th Nadler had no idea that he would receive further information about 1956 Flushing Avenue five days later. However, he did have reasonable ground to conclude that stolen cartons had come from the very premises which his informant had told him was being used as a "drop."

Clearly, Nadler's observations provided an independent basis to confirm that the informant's information was probably accurate.

The F.B.I. was then advised of the burglary of the Air Freight warehouse in Queens on November 12, 1972, a Sunday, and had obtained a description of the various items stolen. The informant called Agent Nadler early Wednesday morning, the 15th, and advised that the merchandise stolen from the Air Freight warehouse in Queens over the weekend was in the "drop" and was going to be moved in two rented trucks. The informant also described the merchandise stolen and told Nadler that the burglary had been reported in the newspaper.

Surveillance established pursuant to this information proved that the informant's information was correct. Murgatroyd and Heidel arrived in a black Ford which Nadler had observed on November 10th. They entered the rear door of 1956 Flushing Avenue. Murgatroyd then exited and entered a parked 4G's rental truck and drove it around the corner and backed it into the "drop". Events then followed a familiar scenario. Anthony Ferrante arrived. Murgatroyd obtained an air compressor from the Sunoco gas station across the street. Heidel then exited and drove the black Ford into the Sunoco station where he was joined by Murgatroyd who had driven the 4G's truck out of 1956 Flushing Avenue. As Murgatroyd and Heidel talked, Ferrante and Lanza came out of the premises and Ferrante signaled to a Hertz truck on Flushing Avenue. This Hertz truck driven by Vesce immediately pulled into the premises and the doors were shut. The 4G's truck and black Ford simultaneously preceded to depart.

As these events unfolded it became obvious that the informant's information was accurate. Additionally, at least some of the individuals involved were known to

the agents. Such a combination has traditionally been recognized to establish probable cause. *United States v. Comissiong*, 429 F.2d 834, 839 (2d Cir. 1970); *United States v. Carneglia*, 468 F.2d 1084, 1088-89 (2d Cir. 1972). This is true even in cases where a so-called untested informant's information is corroborated in its innocent aspects. *United States v. Rollins*, *supra* at 165.

Moreover, the very term probable cause implies that we are dealing with probabilities and not legal technicalities. The probability in this case was clear. Based on a practical understanding of the developing circumstances, the informant's accurate information and the agents independent knowledge, the agents were warranted in believing that stolen goods were being transported in the 4G's truck. *Carroll v. United States*, 267 U.S. 132, 162 (1924); *Brinegar v. United States*, 338 U.S. 160, 175 (1948); *Draper v. United States*, 358 U.S. 307, 313 (1959). The fact that moving vehicles created exigent circumstances requiring the agents to move quickly obviated the necessity of a warrant. *Carroll v. United States*, *supra*, at 153; *Chambers v. Maroney*, 399 U.S. 42, 46-52 (1970). Therefore, agents Good and McGoeys had probable cause to stop the 4G's truck and black Ford. Once it was determined that the truck contained liquor stolen from the warehouse burglary it was proper to arrest Murgatroyd and Heidel.

Additionally, the search of the truck provided probable cause for the arrest of the other persons who remained in the "drop". After being advised that other agents were approaching the front door, agents at the rear saw three men run out of the premises. This fact further contributed to the agents probable cause to believe that Messrs. Vescera, Ianza and Ferrante were fleeing the premises in order to escape detection and arrest for being in possession of stolen goods knowing them to be

stolen. Therefore, the arrest of these fleeing individuals was proper.

Subsequent to the arrest of Messrs. Vescera, Lanza and Ferrante, Agent Armstrong, while still on the public sidewalk, observed through the rear door which had been left open, a large quantity of cases of liquor. Moreover, Agent Armstrong had no idea as to what other accomplices might have remained within the premises in a position to destroy evidence, to remove evidence, to jeopardize the lives of the agents or, finally to facilitate the escape of the individuals already in custody.

Under the totality of facts and circumstances involved, it is respectfully submitted that the actions of Agent Armstrong in immediately entering the premises to determine whether or not other individuals were present, was reasonable and proper. Speed here was essential and only a thorough search of the premises could have insured that no other individuals were present and that the agents had control of all weapons which they knew had been stolen, and which could be used against them. *Warden-Maryland Penitentiary v. Hayden*, 387 U.S. 294, 299 (1967). While inside the "drop", the fact that stolen merchandise was in plain view of Agent Armstrong cannot in any way render invalid his observations of these items and the subsequent seizure of these items by himself and fellow agents. Once the agents had a right to be where they were, they could seize anything in plain view. *United States v. Morell*, 524 F.2d 550, 556, (2d Cir. 1975). *United States v. Rothberg*, 460 F.2d 223 (2d Cir. 1972). The actions of the agents in this case cannot be labelled as being proper or improper under preconceived categories such as a search incident to an arrest, or agents in hot pursuit. Rather, it is respectfully submitted that the actions of the agents must be taken in their totality and viewed in light of the test of reason-

ableness enunciated in the Fourth Amendment of the United States Constitution. See *Chimel v. California*, 395 U.S. 752 (1968).

As noted above, probable cause existed for the agents to believe that stolen merchandise was contained inside 1956 Flushing Avenue. At the time when Messrs. Ves-cera, Lanza and Ferrante attempted their escape, it would have been unreasonable, dangerous and indeed, could be characterized as a dereliction of duty if the agents had not apprehended these fleeing individuals and immediately secured the premises to determine if any other suspects were involved. Therefore, regardless of whatever label is used to generally describe the action of Agent Armstrong, the fact remains that it was reasonable and necessary under the circumstances. Therefore, this action should not be held to be violative of the Fourth Amendment.

### POINT III

**The evidence was sufficient to support the convictions.**

Appellants maintain that their guilt was not proved beyond a reasonable doubt by legally sufficient evidence. In light of the overwhelming evidence in this case such an argument is totally devoid of merit.

A detailed reiteration of the facts here is not necessary (see Statement of Facts, *supra* at page 2 *et seq.*). Suffice it to say that the jury had more than ample evidence from which to make the following findings:

1. The appellants and other three defendants were at 1956 Flushing Avenue for the specific purpose of possession and transporting stolen goods knowing them to be stolen.

2. The appellants were active participants in the handling of these goods.

3. The appellants were involved in a well organized conspiracy.

The legal inferences that could be drawn by the jury were that possession of property two and one half days after its theft was knowing possession and that the very quantity and nature of the items in the warehouse should have made their stolen character obvious. Further, the jury had sufficient evidence to find that the defendants did not all happen upon the scene by accident, but that they were there to transport and possess these goods. In this regard appellants claim that they were not observed actually holding any stolen goods is absurd. The jury had every right to infer that the rental trucks didn't load themselves and that the only persons who could have loaded the trucks were the defendants. Additionally, the jury could find that the air compressor obtained by Mergatroyd was used to inflate the tires of the 4G's truck as it was being loaded with heavy cases of stolen liquor. Also, the jury had ample evidence to find that the arrival of the individuals and the clock-work precision of the movement of the rented trucks did not occur by accident, but resulted from a carefully planned conspiracy. The evidence that Heidel and Vescera used false names to rent the two trucks only added to this reasonable and proper conclusion. Finally, regardless of the characterization appellants place on their flight, it remains as further evidence of guilty knowledge which the jury clearly could have considered. Moreover, the jury could quite properly have found, as they apparently did, that Vescera's testimony was patently unbelievable. Such testimony, of course, would constitute strong evidence of guilt.

## POINT IV

### **Appellants received a fair trial.**

Appellant claims four specific circumstances in which they were denied a fair trial. Even a cursory reading of these arguments reveals their lack of merit.

1. During cross-examination, Agent Sandidge responded to a question by Ferrante's trial counsel that he retained a cap found in the premises because he believed it "to have been used in another crime". Certainly this response should not have been given. However, the agents' answer came after a battery of questions designed to show that while many items were not examined for fingerprints and that gloves found in the premises were not retained as evidence, that a cap was kept. Therefore, the statement of the agent was not "volunteered" as appellants' claim, but was made by way of explanation. Moreover, trial counsel merely asked for a curing instruction and waived the opportunity to move for a mistrial. Thereafter, no objection was made to the judge's immediate admonition to the jury nor were any requests for amplification or modification made (T 337-340).

A fair reading of Judge Bramwell's statement, found on page 338 of the trial record, reveals that appellants' assertion is frivolous. The jury was told to disregard the agent's statement and that no inferences or presumptions were to be made. Trial counsel for Ferrante specifically asked the judge to instruct that "no inferences from that statement" be made (T 337). Additionally, the Government maintains that this argument is improperly raised for the first time on appeal.

2. Appellants next assert it was unfair to allow the Government to introduce into evidence a baptismal

certificate and social security card in the names of George Harris. However, the defense made first mention of the baptismal certificate and asked if it could be produced in Court (T 340). The propriety of the introduction of these items in view of defense counsel's inquiry and other evidence establishing that the trucks used to transport the stolen goods were rented under assumed names is made self evident from the transcript and requires no further elaboration here.

3. Appellant Ferrante asserts that the trial Judge unfairly denied his application for a protective order prohibiting Government cross-examination of him on a prior State misdemeanor conviction for possession of stolen property.

The question of exclusion is clearly within the sound discretion of the trial judge. Rule 403, Federal Rules of Evidence. Absent a clear showing of abuse of that discretion, Judge Bramwell's ruling should not be disturbed.

The record amply reveals that Judge Bramwell requested trial counsel to submit his application in writing so that he could make his ruling on the merits of the case before him (T 431). While Judge Bramwell did mention his concern over his knowledge of Ferrante's "possessive actions" from a prior case in which Ferrante was acquitted, he went on to explain that the prior case involved factors not present in this case (T 429-432).<sup>5</sup> The judge then recessed to consider the matter and upon returning to the bench specifically found that the probative value of such a line of cross-examination was not outweighed by considerations of possible prejudice to the defendant (T 437-38).

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<sup>5</sup> One distinguishing factor is that Ferrante was on probation on the State charge when arrested in this case.

Appellant's only argument with respect to the admissibility of the prior conviction under Rule 404(b) of the Federal Rules of Evidence rests on the brief conclusion that no factual similarity between the State misdemeanor and case on trial was shown. This is not so. Ferrante plead guilty in April, 1971, to the crime of criminal possession of stolen property in the third degree and was sentenced to three years probation in May, 1971 (T 426). It was conceded by counsel for Ferrante that this was a crime of "... similar incident, an incident of similar nature ..." (T 423).

There was, therefore, nothing improper in the ruling of the Court below.

4. The final allegation of deprivation of a fair trial is that the "3500 material" of Mr. Silverman, a Government rebuttal witness was not given to defense counsel during the Government's direct case. This argument is completely without support in either law or fact. The reports of the agents concerning the subject matter of their surveillance, arrest and seizure testimony was properly given to defense counsel. The statement of Mr. Silverman was not required to be produced until after he testified. Title 18, United States Code, Section 3500. In fact, the report of Silverman's interview was given to defense counsel before he testified ( ). The fact that two agents engaged in the surveillance and who testified on the Government's direct case were also the ones who happened to interview Mr. Silverman on November 20, 1972, in no way placed any obligation on the Government to reveal his identity as a potential witness and his expected testimony by delivering a report of his statement to defense counsel.

A report of interview is a statement of the person giving the information and not a statement of the agent who merely makes the report. Moreover, the very purpose of Section 3500 is to enable counsel to test the credibility

of witnesses with prior statements they have made. Surely appellants do not claim that this end would have been achieved by cross examining the agents on subjects and areas they had not testified to, i.e. their interview of Silverman.

To hold otherwise would require the Government to turn over material which did not relate to the direct testimony of a witness and be in direct contravention of Section 3500.

### CONCLUSION

**The judgments of conviction should be affirmed.**

Dated: June 1, 1976

Respectfully submitted,

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# AFFIDAVIT OF MAILING

STATE OF NEW YORK  
COUNTY OF KINGS  
EASTERN DISTRICT OF NEW YORK } ss

LYDIA FERNANDEZ

being duly sworn,

deposes and says that he is employed in the office of the United States Attorney for the Eastern District of New York.

That on the 4th day of June 19 76 he served <sup>two copies</sup> ~~copy~~ of the within

Brief for the Appellee

by placing the same in a properly postpaid franked envelope addressed to:

Evseroff & Sonenshine, Esqs.

186 Joralemon Street

Brooklyn, N. Y. 11201

and deponent further says that he sealed the said envelope and placed the same in the mail chute drop for mailing in the United States Court House, <sup>225 Cadman Plaza East</sup> ~~Washington Street~~, Borough of Brooklyn, County of Kings, City of New York.

LYDIA FERNANDEZ

Sworn to before me this

4th day of June 19 76

JUANITA MAYO  
Notary Public, State of New York  
No. 24-4501911  
Qualified in Kings County  
Commission Expires March 20, 19 77